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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 210

GORDONS TRANSPORTS, INC.,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Gordons Transports, Inc., a Tennessee Corporation, with its principal office at Memphis, Tennessee, prays this Honorable Court for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review its final judgment, entered on the 14th day of April, 1947, affirming a judgment of the District Court of the United States for the Western Division, of the Western District of Tennessee.

Statement of the Matter Involved

This case involves a determination of the applicability of the provisions of the Fair Labor Standards Act of 1938 (29 U. S. C. Sec. 201, *et seq.*) and particularly the exemption contained in Section 13(b) (1) of said Act, to certain of petitioner's employees designated as "breakout men," "wheelers," and "hostlers."

In particular the case involves a determination of whether the petitioner, a motor carrier, operating under the jurisdiction of the Interstate Commerce Commission can be enjoined from employing these three classes of employees in excess of 40 hours per week without compensating them at the rate of time and one-half their regular rate of pay for all hours worked in excess of 40 hours in any one week.

The object of this suit as brought in the District Court was to enjoin certain alleged violations of the Fair Labor Standards Act, said to have been committed by petitioner (Tr. 25).

The issues at the trial were narrowed by the Administrator limiting his request so that the injunction sought would apply, only, to employees of the petitioner who are classified as "checkers," "breakout-men," "stackers," "wheelers" and "hostlers" (Tr. pp. 24, 25).

The Administrator contended that these employees are subject to the overtime provisions of Section 7 of the Fair Labor Standards Act. Petitioner contended that they are exempt from the overtime provisions of Section 7, by reason of the duties performed by them and by reason of Section 13(b) (1) of said Act.

Following the trial of the case the Honorable District Judge made findings of fact and conclusions of law wherein he held that 2 classes of petitioner's employees, namely, "checkers" and "stackers" were so exempt (Tr. p. 308).

He further held that the remaining 3 classes, namely, "hostlers," "breakout-men" and "wheelers," were not exempt (Tr. pp. 308-310) and judgment was entered, enjoining petitioner from violating Section 7 with respect to the latter 3 classes of employees (Tr. p. 311).

The Administrator filed no appeal from the Court's action with respect to "checkers" and "stackers."

Feeling aggrieved the petitioner did appeal the decision of the District Court with respect to "break-out men," "wheelers" and "hostlers."

The United States Circuit Court of Appeals for the Sixth Circuit by judgment entered April 14, 1947, affirmed the judgment of the District Court entered September 5, 1945.

Jurisdictional Statement

Jurisdiction to review a final judgment of the United States Circuit Court of Appeals is confirmed upon this Court by statute (U. S. Code, Title 28, Section 347). This Petition for Writ of Certiorari seeks review of a final judgment of the United States Circuit Court of Appeals for the Sixth Circuit.

Question Presented

The District Court in deciding that "break-out men," "wheelers" and "hostlers" are not covered by the 13(b)(1) exemption held that the activities of these employees except on infrequent occasions do not directly affect the safety of operation of motor vehicles transporting property in interstate commerce (Tr. pp. 301, 302, 306) and they are not exempt. This decision was affirmed by the Circuit Court of Appeals. Thereby the District Court made an independent determination of his own on the question of whether or not the activities of these employees affect safety of operation of motor vehicles, contrary to and without reference to the decisions and holdings of the Interstate

Commerce Commission wherein they defined "loaders" and "drivers" and held that their duties affect safety of operation, and took jurisdiction of these employees.

In *Ex Parte* 2, 28 M. C. C. 125 at pages 133, 134, the Interstate Commerce Commission defined a "loader" as follows:

> "The large carriers, however, and particularly those who have important operations from terminal to terminal, employ men variously called loaders, dockmen, or helpers, and hereinafter called loaders, whose sole duties are to load and unload motor vehicles and transfer freight between motor vehicles and between the vehicles and the warehouse."

In *Ex Parte* 2, 11 M. C. C. 203 at pages 212 and 213, the Commission defined a driver as follows:

> "(a) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive or car operated exclusively on a rail or rails.
>
> "(b) The term 'driver' means any individual who drives in transportation in interstate or foreign commerce any motor vehicle as defined in paragraph (a) above."

The Commission in these decisions pursuant to the jurisdiction conferred upon it by Section 204(a) of the Motor Carrier Act of 1935, determined that "loaders" and "drivers" devote a large part of their time to activities which directly affect safety of operation, and that they have power to regulate these classes of employees, and thereby took jurisdiction of them, which automatically includes them under the 13(b)(1) exemption.

Petitioner has contended throughout this case that the duties of a "breakout-man" and "wheeler" constitute

them a "loader" and the duties of a "hostler" constitute him a "driver,"[1] as defined by the Commission.

The questions then presented here are:

1. Was the Circuit Court of Appeals justified in affirming the judgment of the District Court, wherein the District Court disregarded the findings of the Interstate Commerce Commission with respect to "loaders" and "drivers," and made its independent determination of the question of whether the duties of the "breakout-men," "wheelers" and "hostlers" affect safety of operation, rather than taking the definition of these employees as given by the Interstate Commerce Commission, and confining its findings and conclusions to the judicial determination of whether or not the duties performed by these classes of employees brought them within such classifications?

2. Do the duties performed by the "breakout-men," "wheelers" and "hostlers" bring them within the classification of "loaders" and "drivers" as those classifications are defined by the Interstate Commerce Commission?

Reasons Relied upon for Allowance of Writ

Petitioner advances the following reasons as grounds upon which this Honorable Court should, in its discretion, grant a Writ of Certiorari as herein prayed:

1. Applicability of the provisions of the Fair Labor Standards Act to the three classes of employees here involved is a matter of substantial and national importance. The petitioner, Gordons Transports, Inc., is one of the larger motor carriers of the nation, operating from Chicago, Illinois, to New Orleans, Louisiana, Birmingham, Alabama, Jackson, Mississippi, and Mobile, Alabama, by authority of

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[1] The specific duties of these various classes of employees are fully set forth in the brief to which reference is hereby made.

Certificates of Public Convenience and Necessity issued to it by the Interstate Commerce Commission.

The operations conducted by it, and the method used by it for handling freight in its warehouse, viz., by means of a crew of men composed of a "checker" who bosses the crew, and a "stacker," "breakout-man" and "wheeler," is typical and exemplary of the methods used by hundreds of the other larger carriers throughout the United States.

It has for years been conceded that the Interstate Commerce Commission has jurisdiction of drivers of interstate motor carriers and they are therefore exempt from the Fair Labor Standards Act.

Likewise in a very recent decision [2] this Court has put at rest the question of whether or not a "checker" is subject to the jurisdiction of the Interstate Commerce Commission and therefore exempt from the Wage and Hour Act, by holding that this employee is exempt.

However, this Court has not passed on the proposition of whether or not the exemption contained in Section 13(b)(1) applies to "breakout-men," "wheelers" and "hostlers" or employees of motor carriers who perform duties similar to those performed by these employees, regardless of their named classification.

The decision of this case would be a case of first impression in this Court.

Because of the nation-wide importance of the questions involved here, and because the determination of the questions involved here will affect the operations of motor carriers throughout the country, this Court should grant this writ and determine for the motor carrier industry the

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[2] *Levinson* v. *Spector Motor Service*, 67 S. Ct. 931.

applicability of non-applicability of the 13(b)(1) exemption to these employees.

The decisions of the lower courts are in conflict on the question presented here.

In the case of *Keeling* v. *Huber and Huber Motor Express, Inc.*, 57 Fed. Supp. 617, the District Court held that employees engaged in wheeling and unloading are not engaged in work that directly affects safety of operation.

The District Court in the case of *Walling* v. *Silver Fleet Motor Express, Inc.*, 67 F. Supp. 846, likewise held that unloading, wheeling and working in the warehouse does not affect safety.

However, in the case of *Crean* v. *Moran Transportation Lines, Inc.*, 57 F. Supp. 212, the District Court held that the duties of "breaker" and "wheeler" do affect safety of operation.

Likewise, the Interstate Commerce Commission has held that employees who load and unload trucks, transfer freight between trucks and between trucks and the warehouse affect safety of operation.

Also the Interstate Commerce Commission and the Wage and Hour Division differ in their interpretation of the 13(b)(1) exemption. For example, the Division requires an employee to spend a greater part of his time at exempt activities to be covered by the exemption. The Commission only requires a substantial part of his time to be so spent.

These differences in the decisions of our courts and in the interpretations made by the Commission and the Administrator, indicate clearly the confusion with which the motor carrier industry has been beset since the passage of the Wage and Hour Act. They indicate that this case involves a question of utmost importance to the motor carrier industry and the hundreds of persons employed by them, and

that the questions of Federal law involved here should be settled definitely for the benefit of all concerned.

Furthermore this case has been decided by the Court of Appeals directly contrary to and in direct conflict with the principles announced by this Court in the very recent cases of *Levinson* v. *Spector Motor Service*, 67 S. Ct. 931, and *Pyramid Motor Freight Corporation* v. *Ispass, et al.*, 67 S. Ct. 954, both decided in March of this year.

In these two cases and especially in the *Pyramid* case, *supra*, this Court has very definitely laid down the rule that the Commission has already determined that "loaders" affect safety of operation of motor vehicles, and that the prerogative of the Court in cases involving such matters is to only judicially determine whether or not an individual employee comes within the classification of a "loader" or other classifications as established by the Commission.

The District Court made no attempt at such a judicial determination, and neither did the Court of Appeals. It simply affirmed the District Court on the basis of the *Pyramid* case, and in effect held that the Court and not the Commission could determine what duties affect safety of operation.

This holding, although based on the *Pyramid* case, *supra*, is clearly contrary to the holding of this Court in that case, and this case should be brought here in order that this Court may lay down the correct principles under which it should be decided, and settle the question definitely and finally that the function of the Court in this type of case is simply to judicially determine whether or not an employee comes within the classifications as defined by the Commission.

Prayer for Issuance of Writ of Certiorari

WHEREFORE, Petitioner respectfully prays this Court for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review its final judgment in the above case, entered April 14, 1947.

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Dated: Memphis, Tennessee, July 12, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 210

GORDONS TRANSPORTS, INC.,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Nature of Controversy

This case arises under the Fair Labor Standards Act of 1938 (29 U. S. C., Sec. 201, *et seq.*) upon complaint filed by L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Act, to restrain Gordons Transports, Inc., hereinafter referred to as petitioner from violation of Sections 15(a)(2) and 15(a)(5) of the Act.

The complaint was filed in the United States District Court for the Western Division of the Western District of Tennessee.

The cause was tried on oral testimony, briefs were submitted by Counsel, and thereafter the Court sustained the bill as to three classes of employees, namely, "breakoutmen", "wheelers" and "hostlers," enjoined the defendant from violating the Act as to these employees, and dismissed the bill as to the employees classed as "checkers" and "loaders."

The Administrator's claim of violation of Section 15(5) was not urged at the hearing.

Decree Sought to Be Reviewed

Review is here sought of a final judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered April 14, 1947, affirming the judgment of the District Court for the Western Division of the Western District of Tennessee, which decree provided as above set forth.

Reference to Official Reports

The conclusions of law and decree of the District Court, and the Order of the United States Circuit Court of Appeals for the Sixth Circuit are not officially reported.

The District Court's findings and conclusions appear in the transcript pp. 292-313 both inclusive. A copy of the Order of the United States Court of Appeals is attached hereto as Appendix A.

Statement of Jurisdiction

Review of a final judgment of the United States Circuit Court of Appeals for the Sixth Circuit by Writ of Certiorari is sought of this Court within the discretionary powers conferred upon this Court by statute (U. S. Code, Title 28, Section 347).

Summary of Evidence

This case was presented to the United States District Court for the Western Division of the Western District of Tennessee upon oral testimony of witnesses for both parties. The record shows the following facts.

The undisputed facts are that Petitioner is a motor carrier, operating in interstate commerce, under the control and supervision of the Interstate Commerce Commission, by virtue of a certificate of convenience and necessity issued to it by the Interstate Commerce Commission in Docket No. MC-11220 and sub-numbers. It maintains and operates a terminal and warehouse in Memphis, Tennessee.[3]

At this terminal, and in the warehouse, Petitioner employs three classes of employees, among others, designated as "breakout-men," "wheelers" and "hostlers."[4]

Petitioner's warehouse force is divided into several crews each of which is under the supervision of a "checker," and consists of the "checker," "stacker," "breakout-men," and "wheelers," these crews being used by petitioner to load and unload its trucks.[5]

The "breakout-man' performs the following duties:

1. When a truck is being loaded from the warehouse a breakout-man stays in the warehouse at a bin therein, takes the freight out of the bin, calls the name of the consignee and destination to the checker, and places it on a two-wheel hand truck.[6]

2. When a truck is being loaded by transferring the load directly to it, from another truck, he stands in the truck that is being unloaded and takes the freight out of the

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[3] Tr. p. 33.

[4] Tr. pp. 24, 42, 43.

[5] Tr. pp. 42, 43.

[6] Tr. pp. 46, 48, 190, 205, 238, 239, 247, 262.

pile in the truck, calls it to the checker, and places it on the two-wheel hand truck.[7]

3. When a truck is being unloaded into the warehouse this same procedure is followed. When the services of a whole crew are required to move a heavy shipment, he, physically, along with the rest of the crew helps move the shipment.[8]

4. When it becomes necessary to shore or prop a heavy shipment in the truck, the breakout-man assists in this operation.[9]

5. He likewise helps the stacker place heavy freight in the truck where it will ride on its over-the-road journey.[10]

6. It is further his duty to call to the attention of the checker or wheeler any leaking demijohns of acid, or any damaged or broken shipments or any damage to the truck, inflammable or dangerous shipments, and to such shipments that do not bear proper required warning labels when a truck is being loaded.[11]

7. The breakout-man must be cognizant of the proper method of unloading a truck which consists of withdrawing the freight from the stack properly so as to prevent the whole stack from falling and damaging the truck.[12]

8. When the loading crew is short, or when a truckload of various kinds of commodities is being loaded or unloaded, the breakout-man pushes a two-wheeler along with the rest of the wheelers.[13]

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[7] Tr. pp. 47, 48, 202, 203, 227.
[8] Tr. pp. 54, 160, 189, 204, 238, 245, 247, 264, 283.
[9] Tr. pp. 71, 72.
[10] Tr. pp. 190, 191, 204, 250.
[11] Tr. pp. 203, 204, 205, 241, 254, 257.
[12] Tr. p. 72.
[13] Tr. pp. 241, 257.

The duties of a "wheeler" are as follows:

1. When a truck is being loaded, the wheeler pushes a small two-wheel hand truck loaded with freight from the bin in the warehouse, or from another truck up into or down into the truck that is being loaded, and places it with the other freight as directed by the stacker. When a truck is being unloaded the reverse of this procedure is followed.[14]

2. If a shipment which is being loaded into a truck is too heavy for the stacker alone to handle, the wheeler helps the stacker place the shipment where it will ride. He likewise helps the breakout-man with heavy shipments.[15]

3. In the cases of loading heavy shipments that would not be damaged by jarring, after the shipment is removed from the two-wheeler, and placed on the floor of the truck, the wheeler assists the stacker in loading it by jamming or pushing the shipment into place with his two-wheeler.[16]

4. He assists the stacker in shoring shipments.[17]

5. When a truck has been loaded up to a point where the stacker must work on top of a high pile of freight in the truck, the wheeler takes the freight off the two-wheeler and lifts it to the stacker.[18]

6. If the freight is being transferred from one truck to another, the wheeler pushes the two-wheeler out of the truck that is being unloaded across the dock to, or across a steel plate, and into the truck that is being loaded.[19]

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[14] Tr. pp. 49, 190, 218, 228, 236, 262.
[15] Tr. pp. 49, 59, 218, 220, 228, 237, 262, 264.
[16] Tr. pp. 53, 223, 224.
[17] Tr. pp. 71, 72.
[18] Tr. pp. 53, 218, 220.
[19] Tr. pp. 51, 52.

7. In the above procedure, if the freight is light and small, it might be passed by hand from truck to truck, and the wheeler participates in this work.[20]

8. He does not use the two-wheeler all of the time, as he sometimes handles shipments into the truck by carrying them by hand, or assisting along with the whole crew in carrying a heavy shipment into a truck. Typical of such freight are long pipes, or bars, which are placed by hand in the truck where they will ride in their over-the-road journey.[21]

9. On heavy shipments, he helps along with the rest of the crew in moving shipments which are so heavy that they must be moved on rollers, pushing the shipment into the truck into position where it will ride, or pushing or rolling the shipment out of the truck onto the dock and into the warehouse.[22]

10. It is their duty to know how to ease heavy shipments off of the two-wheeler onto the trucks to prevent damage to the truck, or other freight in the truck.[23]

11. When a truck is being loaded or unloaded, the wheeler must roll the two-wheeler up into or down into the truck over a steel plate in such a manner so as not to hit this board too hard, and so as to keep the freight from falling off of the two-wheeler, causing damage to the truck, its tires, other freight or to other employees.[24]

12. It is further his duty to roll the freight on the two-wheeler carefully through the warehouse when a truck is

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[20] Tr. pp. 51, 52.
[21] Tr. pp. 53, 55, 56.
[22] Tr. pp. 54, 55, 220, 231, 232, 242, 253, 254, 262, 264, 283.
[23] Tr. pp. 51, 52.
[24] Tr. pp. 52, 210, 211, 223.

being loaded or unloaded, so as to not strike dangerous shipments, or break cartons or crates or so damage the same so that they will collapse on the over-the-road journey, and thereby cause a shifting of the load in the truck.[25]

13. In loading and unloading it is his duty to watch for leaking, damaged, broken or dangerous shipments.[26]

The duties of a "hostler" are as follows:

1. He is an expert driver, and moves vehicles to and from the loading dock, and to and from the garage, dis-connecting the tractors which have to be repaired.[27]

2. In coupling up a tractor and trailer he backs the tractor in such a way that the "V" shaped slot on the fifth wheel on the tractor will catch the king-pin on the trailer.[28]

3. He then makes the air or vacuum brake hose connections from the tractor to the trailer and connects the marker lights. He is required to test the fifth wheel, brake, and light connections. If they are properly made he then drives and parks the unit out on the parking lot to be picked up by the road driver.[29]

4. He handles loaded trucks from the parking lot to the dock, and from the dock to the parking lot.[30]

5. He drives a tractor-trailer unit from petitioner's terminal to the Air Depot, a distance of six or seven miles, leaving a trailer and picking up one.[31]

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[25] Tr. pp. 126, 127, 224, 225.
[26] Tr. pp. 224, 254.
[27] Tr. pp. 73, 76, 88, 268, 285.
[28] Tr. p. 73.
[29] Tr. pp. 73, 74, 269, 270, 278, 281, 283, 288.
[30] Tr. pp. 77, 270, 284.
[31] Tr. pp. 79, 80.

6. When disconnecting a trailer the hostler must lower the landing gear on the front end of a trailer and raise it when the tractor and trailer have been disconnected.[32]

7. He makes an inspection of the unit after parking it on the lot to determine if it is roadworthy insofar as the brakes, lights, fifth wheel connection and dollies are concerned, and if any defect is discovered he calls the inspector.[33]

8. He is to report any defects about the truck which he discovers.[34]

9. He has to back the tractor-trailer units up to the dock so as to not block the alley, on the west side of the terminal.[35]

10. He is the last man to handle the road truck before the road driver takes it.[36]

The "breakout-men," and "wheelers," spend their entire time and are concerned only with the loading and unloading of trucks and transferring freight from truck to truck and between the trucks and the warehouse.[37]

The hostler of course has only one job, that of handling and driving trucks as outlined above.

The District Court held that "breakout-men," "wheelers," and "hostlers," whose sole duties are those as set out above, are engaged in activities which do not affect safety of operation of motor vehicles transporting property in interstate commerce.

The United States Circuit Court of Appeals affirmed this action of the trial court.

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[32] Tr. pp. 81, 82, 280.
[33] Tr. pp. 85, 87, 279.
[34] Tr. pp. 85, 273.
[35] Tr. p. 285.
[36] Tr. p. 284.
[37] Tr. pp. 57, 58, 92, 223, 242, 243, 256.

Specification of Assigned Errors

Petitioner alleges that the United States Circuit Court of Appeals for the Sixth Circuit committed error in its entry of judgment on April 14, 1947, in the following respects:

1. In affirming the judgment of the District Court in which that Court held that Petitioner's employees classified as "breakout-men," "wheelers" and "hostlers" perform duties which do not directly affect safety of operation of motor vehicles, since the Interstate Commerce Commission has already determined that their duties do affect safety of operation.

2. In affirming the decision of the District Court in which that Court made a determination of the question of whether or not the duties of "breakout-men," "wheelers" and "hostlers" affect safety of operation, rather than limiting his decision to the making of a judicial determination of whether or not the duties of the "breakout-men" and "wheelers" constitute them "loaders" and the duties of the "hostler" constitute him a "driver" as those classifications are defined by the Interstate Commerce Commission.

3. In affirming the decision of the District Court wherein it failed to find that the duties performed by "breakout-men" and "wheelers," constitute them "loaders" and the duties performed by the "hostler" constitute him a driver" as those terms are defined by the Interstate Commerce Commission, which would automatically place them under the 13(b)(1) exemption.

4. In failing to reverse the decision of the District Court and decide that under the pleadings and proof in this case the District Court could only determine whether or not the "breakout-men" and "wheelers" fell within the classifica-

tion of a "loader" and the "hostler" fell within the classification of a "driver" as those classifications are defined by the Interstate Commerce Commission.

5. In failing to reverse the decision of the District Court, and decide that under the pleadings and proof in this case the duties of "breakout-men" and "wheelers" brought them within the classification of "loaders" and the duties performed by the "hostler" brought him within the classification of a "driver" as those classifications are defined by the Interstate Commerce Commission.

6. In affirming the action of the District Court which decision was made contrary to the principles announced by the United States Supreme Court in the case of *Pyramid Motor Freight Corporation* v. *Ispass,* 67 S. Ct. 954.

7. In failing to reverse the decision of the District Court and dismiss this action.

8. In affirming the decision and judgment of the District Court enjoining Petitioner as provided in said judgment.

Argument

The Petitioner makes two basic contentions in this case:

1. The District Court based its decision on the proposition that the duties performed by "breakout-men," "wheelers" and "hostlers" do not affect safety of operation.

Petitioner alleged in its answer and has urged throughout the case that the "breakout-men" and "wheelers" perform duties which constitute them "loaders," and "hostlers" perform duties which constitute them "drivers" as those classifications are defined by the Interstate Commerce Commission in Ex Parte 2, 11 M. C. C. 203 and 28 M. C. C. 125.

The District Court should have therefore, decided the single question of whether or not the duties performed by

these employees brought them within these respective classifications.

2. That the duties performed by the "breakout-men" and "wheelers" constitute them "loaders" and the duties of a "hostler" constitute him a "driver" as those classifications are defined and contemplated by the Interstate Commerce Commission in Ex Parte No. MC-2, *supra*.

That falling within these classifications they are under the jurisdiction of the Interstate Commerce Commission and therefore are exempt from the Fair Labor Standards Act.

REVIEW OF PROCEEDINGS OF THE INTERSTATE COMMERCE COMMISSION

We do not feel that it is necessary here to indulge in a lengthy review of the many proceedings, hearings and reports of the Interstate Commerce Commission,[38] dealing with its jurisdiction over "loaders" and "drivers" because this Court has reviewed the progress of these proceedings at great length in the case of *Levinson vs. Spector Motor Service*,[39] 67 S. Ct. 931, and is therefore thoroughly familiar with them.

However there are certain parts of the findings and conclusions in Ex Parte No. MC-2 which are particularly pertinent here.

The Commission in its decision in 28 M. C. C. 125 concluded as follows:

> "We therefore interpret the phrase 'safety of operation' as meaning the safety of operation of motor vehicles."

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[38] To be hereinafter referred to as the Commission.

[39] For the sake of brevity this case will be referred to as the *Levinson* case.

The Commission further there concluded that:

> "We therefore concluded that under section 204(a) we have the power to establish qualifications and maximum hours of service with respect only to employees who devote a *substantial part* of their time to activities which directly affect the safety of operations. Our task is thus narrowed to determining which employees of common and contract carriers and of private carriers of property by motor vehicles, engaged in interstate or foreign commerce, fall within this category." (Emphasis added.)

In considering the class of employees commonly called "loaders" in the motor carrier industry, the Commission in this decision defines this class of employees to be:

> "The large carriers, however, and particularly those who have important operations from terminal to terminal, employ men variously *called loaders, dockmen, or helpers, and hereinafter called loaders, whose sole duties are to load and unload motor vehicles, and transfer freight between motor vehicles, and between the vehicles and the warehouse.*" (Emphasis added.)

The Court will note that the duties of this class of employees are to load and unload motor vehicles and transfer freight between motor vehicles, and between vehicles and the warehouse.

Under Findings of Fact, No. 2, the Commission in this same report said:

> "That 'loaders,' as above defined, employed by common and contract carriers, and private carriers of property by motor vehicles, subject to Part II, Interstate Commerce Act, devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce."

Under the heading, "Conclusions of law," in this same opinion, the Commission concluded as follows:

> "That we have power under Section 204(a) of said Part II to establish qualifications and maximum hours of service for the classes of employees covered by Findings of Fact, No. 1, 2, and 3 above, and that we have no such power over any other classes of employees other than drivers."

Likewise, in this same proceeding, Ex Parte No. MC-2, but in an earlier decision reported at 11 M. C. C. 203, the Commission held that "drivers" affect safety of operations, it there took jurisdiction over them and defined a "driver" in the following way:

> "(a) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used on the highways in transportation of persons or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive or car operated exclusively on a rail or rails."
>
> "(b) The term 'driver' means any individual who drives in transportation in interstate or foreign commerce any motor vehicle defined in paragraph (a) above."

It there prescribed maximum hours of service for this class of employees.

As to the jurisdiction of the Commission to make such findings and conclusions of law this Court in the *Levinson* case, said:

> "These findings of fact are squarely within the jurisdiction of the Commission. They state affirmatively that, in the opinion of the Commission, the activities of loaders as described by the Commission do affect the safety of operation of motor vehicles in interstate or foreign commerce. They include also a finding that

such loaders 'devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce.' In the absence of any discussion or classification, on a time basis, of the several activities of loaders described by the Commission, this additional finding amounts to another way of saying that a large part of the loader's activities affect such safety of operation."

* * * * * * *

"We recognize the Interstate Commerce Commission as the agency charged with the administration and enforcement of the Motor Carrier Act and especially charged with the establishment of qualifications and maximum hours of service of employees of common and contract carriers and private carriers of property by motor vehicle in interstate and foreign commerce. We see no reason to question its considered conclusion that the activities of full-duty drivers, mechanics, loaders and helpers, as defined by it, affect safety of operation of the carriers by whom they are employed. In harmony with our reasoning in Southland Co. *v.* Bayley, supra, and with that of the Interstate Commerce Commission in Ex Parte No. MC-3, 23 M. C. C. 1, as to employees of private carriers, and in Ex Parte Nos. MC-2 and MC-3, 28 M. C. C. 125, as to mechanics, loaders and helpers in general, we hold that the Commission has the power to establish qualifications and maximum hours of service under Sec. 204(a) with respect to full-duty employees engaged in doing the work of loaders, although the Commission has not exercised that power affirmatively by establishing qualifications and maximum hours of service with respect to loaders." (See Pages 942-943 of Opinion.)

This Court has upheld and approved the findings of the Commission that the activities of "loaders" and "drivers" affect safety of operation.

It has therefore been settled that the duties performed by "loaders" and "drivers" affect safety of operation.

This Court in the *Levinson* case further upheld the findings and conclusions of the Commission that it has jurisdiction over these classes of employees, and they are consequently exempt from the Fair Labor Standards Act.

It therefore follows that when the 13(b)(1) exemption is plead on the basis that an employee performs duties which constitute him a mechanic, loader, driver or helper as those classifications are defined by the Commission, the only question with which the Court should concern itself is what duties the employee performs and are those duties such as bring him within the classifications as established by the Commission; and it should not reenter upon an investigation of the question of safety of operation which has already been so expertly dealt with by the Commission.[40]

In fact this Court so held in the case of *Pyramid Motor Freight Corporation* v. *Ispass*, 67 S. Ct. 954.

In that case, where the exemption of "loaders" was plead, the District Court refused to determine the status of the particular employees, saying that this was a matter for the Commission to determine. The parties refused to submit the matter to the Commission and the Court dismissed the case.

The Court of Appeals reversed, and ordered remand for judgment for plaintiffs.

This Court ordered a remand but gave the District Court definite directions as to the disposition of the case. This Court said:

> "Under these circumstances, there is no occasion for us to refer to the Commission any question presented in this case nor to suspend the long delayed final judgment pending further findings by the Commission. The Commission has done its work. The District Court must determine simply whether or not the respective

[40] The *Levinson* case.

employees who seek to recover overtime compensation under Sec. 7 are excluded from the benefits of that Section because they are within the above classification. The special knowledge and experience required to determine what classifications of work affect safety of operation of interstate motor carriers have been applied by the Commission. The determination whether or not an individual employee is within any such classification is to be determined by judicial process."

• • • • • • •

"The District Court shall give particular attention to whether or not the activities of the respective respondents included that kind of 'loading' which is held by the Commission to affect safety of operation." (See Page 960 of Opinion.)

It is therefore clear from the two opinions above cited that the only question which the Court can consider in this case, since the Petitioner has plead that these employees fall within the classification of "loaders" and "drivers," is whether or not they perform duties which bring them within these classifications.

This should be the law, for the motor carriers are entitled to some definite standard under which they can operate and classify and pay their employees. Likewise the employees are entitled to the same thing. Only the Commission, and not the Courts or any other agency can set one standard by which all can be equally governed.

Since the passage of the Wage and Hour Act the status of these particular classes of employees has been in a constant state of confusion.

The Commission has asserted jurisdiction over these employees; the Administrator has denied this jurisdiction by requiring 51% of the employees time to be spent at exempt activities.

The District Courts differ in their interpretation of this exemption.

Two District Courts have held that the employees who wheel and unload perform duties which do not affect safety of operation.[41]

Another District Court has held that the duties of "wheelers" and "breakers" do affect safety of operation.[42]

Likewise the lower Courts in the *Pyramid* case decided the case directly opposite to each other.

As this Court has said,[43] we are here dealing with the safety program of the Commission and the regulations prescribed by the Commission pursuant thereto, which has been congressionally approved.

This program is being carried out by the Commission, with its expert judgment in the field of motor carrier operations pursuant to the power conferred upon it by Congress. *It* is the body to determine whether the duties performed by certain employees affect safety of operation. The standards set by it should be recognized, as this Court has done.[44]

Speaking of regulations promulgated by the Commission this Court said:

> "This requirement, established by the agency which is recognized by Congress as the *one body* authorized to establish qualification and maximum hours of service applicable to drivers of motor carriers in interstate commerce * * *." (Page 947 of Opinion.) (Emphasis ours.)

In view of this holding of this Court neither the Courts, the Wage and Hour Administrator or anyone else has the

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[41] *Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617.

[42] *Crean* v. *Moran Transp. Co.*, 57 F. Supp. 212.

[43] The *Levinson* case, p. 945.

[44] The *Levinson* case.

right to say whether or not the duties performed by "loaders" and "drivers" affect safety of operation.

This question has been settled by the only body with authority to settle it, the Commission, and henceforth the only question which can arise for decision is whether or not an employee comes within the classifications as delineated by the Commission.

The District Court therefore erred in basing its decision on the question of safety of operation, and the Circuit Court of Appeals erred in affirming its decision.

We respectfully therefore ask this Court to limit its consideration of this case to only two propositions, *i. e.:*

1. Do "breakout-men" and "wheelers" perform the duties of a "loader" as defined by the Commission; do "hostlers" perform the duties of a "driver" as defined by the Commission? and

2. Do they spend a substantial portion of their working time at such activities?

THE DUTIES OF THE "BREAKOUT-MEN" AND "WHEELERS" BRING THESE CLASSES WITHIN THE DEFINITION OF A "LOADER" AS DEFINED BY THE INTERSTATE COMMERCE COMMISSION.

It is undisputed on this record that *these employees perform no duties except those which are connected with the process of loading and unloading trucks.*

We are therefore not concerned here with a partial duty loader, but were we concerned with a partial duty "loader" he would still be exempt.[45]

In our statement of facts we have analyzed the duties of "breakout-man" and "wheeler" and will not repeat a description of these duties here. A reference to this analysis will show that the duties performed by these employees

[45] The *Levinson* case.

clearly bring them within the definition of a "loader," which is as follows:

> "The large carriers, however, and particularly those who have important operations from terminal to terminal, employ men variously called loaders, dockmen or helpers, and hereinafter called loaders, whose sole duties are to load and unload motor vehicles and transfer freight between motor vehicles, and between the vehicles and the warehouse." [46]

We do not think it will be contended by the Administrator that these employees perform duties unconnected with the loading or unloading of a truck. The record shows conclusively that the "breakout-man" continuously performs the duties of a "breakout-man" except on occasions when he operates a two-wheel truck or is helping to move a heavy shipment along with the rest of the crew. In the same way the "wheeler" operates his two-wheel vehicle continuously except when he is helping to move a heavy shipment. However, even on the occasions when these men are not performing the direct duties connected with their regular job, as noted immediately above, they are still, as the Commission says, *transferring freight between vehicles and between the vehicles and the warehouse, loading and unloading trucks. At no time do they depart from their duties incident to loading and unloading trucks.*

In order for them to be exempt, the Commission requires that these employees spend a substantial amount of time at their duties as a "loader."

This record conclusively shows that they spend their entire time at loading and unloading trucks and transferring freight between the vehicles and between the vehicles and the warehouse.

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[46] *Ex Parte* MC-2 and 3, *supra.*

This can be seen from the following abstract of the testimony.

Petitioner's witness, Mr. Davis, secretary-treasurer of Petitioner, who is familiar with the duties of these employees, testified that the "checkers", "breakout-men," "stackers" and "wheelers" perform duties which are one hundred per cent that of loading and unloading trucks and transferring freight from truck to truck, or from the warehouse to the truck. *This is all they have to do; they have no other duties, and their activities are confined to the warehouse, to loading and unloading trucks on the lot* (Tr. 57, 58, 92).

Respondent's witness Wall, a wheeler, testified that he doesn't do anything except duties in connection with loading and unloading trucks, that is all he does, and the freight handled by him is handled either between trucks and the warehouse, or between trucks (Tr. 223).

Respondent's witness Johnson, a breakout man, testified that everything he does is in connection with loading and unloading and the freight is always loaded from the truck to the warehouse, or from the warehouse to the truck or between trucks (Tr. 242, 243).

Respondent's witness Atkins, a checker, testified that all of his duties and those of his crew consist of unloading and loading freight from the truck to the warehouse or between trucks, and that he has no other duties (Tr. 256).

This testimony is uncontradicted and this point is unquestionably established by the proof in this record.

Under the decisions heretofore cited, this Court is not to be concerned with the wisdom of the Commission's decision and definition heretofore quoted. It is not to be concerned about the facts on which the decision was made, neither is it to be concerned with a review of the discretion exercised by the Commission in making this decision. We urge that

the Court should take this definition as is, and if the record shows that the duties performed by the employes consist of loading and unloading trucks, transferring freight between trucks or between trucks and the warehouse, then it should hold that the "breakout-man" and "wheeler" are "loaders," and are therefore covered by the exemption. If the Court finds that a "hostler" performs duties of a "driver," the Court without further ado, should hold that the "hostler" likewise comes under the exemption.

It is the Petitioner's contention that from the minute the breakout-man lifts a carton up out of a bin or out of a truck, and places it on the two-wheeler, the process of loading a truck begins. This process is further continued by the wheeler transporting the freight on his two-wheeler from the bin (or the truck) into the truck where it is taken by the stacker, and places in the road truck in the spot where it is going to ride. Then and only then does the process of loading that piece of freight stop.

The same thing is true of shipments that must be moved on rollers, or those shipments which are carried into the truck by hand. From the moment that the shipment is touched by the loading crew until the time that it reaches its final resting place in the road truck, the process of loading that piece of freight is in motion.

The same thing is true in the reverse direction when freight is being unloaded from the truck.

It will be noted that the definition of the Commission is broad. The Commission, in its definition of a "loader", did not say that employees who actually place the freight in the truck where it is going to ride shall be considered as a "loader." Neither did it say that the employees who push the two-wheelers shall be considered "loaders." The Commission's definition states that those employees are "loaders" whose duties are "to load and unload motor

vehicles," and "transfer freight between motor vehicles and between the vehicles and the warehouse." Under the Commission's definition of "load" and "unload," the breakout-man, the two-wheeler, the stacker and the checker are each and every one a distinct part of a crew which load and unload trucks. The "breakout-man" is just as much a part of the crew which loads and unloads trucks as is the "stacker." Likewise, the "two-wheeler" is just as much a part of that loading and unloading crew as is the "stacker" or the "checker." The crew does not function, as it is intended to function, unless all members of the crew are present. Each and every one of them performs steps in the operation of the loading or unloading of a truck. They all handle the freight as it is being loaded or unloaded from the truck, and the crew as a whole working through its separate members are engaged in transferring freight "between vehicles" and "between the vehicles and the warehouse."

Their sole job is to "load" and "unload" trucks. They work in a distinct department of the Petitioner's business, *i. e.*, the warehouse, just as the garage, the accounting department, the billing department, or the executive department, is a distinct department. They have their work to do and they do it, and *never perform any work in any of the other departments.*

With respect to the "two-wheelers," their duties consist of transporting the freight out of the warehouse to the dock, and from the dock up into the truck on two-wheel push carts, or transporting the freight out of the truck onto the dock and into and through the warehouse. They also move heavy shipments by hand into the truck and place it where it is going to ride on its over-the-road journey. This is done either by the use of rollers, or by physically and bodily picking up a piece of freight and carrying it by hand into the truck, and placing it in the truck. It is also their duty to

assist the stacker in placing shipments in the truck where they will ride, and to assist him in moving heavy shipments about in the truck, jamming them with their two-wheelers, into place where they are going to ride. In performing these duties, they are certainly loading a truck and performing duties which are a necessary integral part of the loading process. When a truck is being unloaded, these employees help the stacker take the freight off of high stacks of freight and place them on the two-wheeler, and they move freight out of the truck onto the dock, or into another truck.

This is certainly "unloading" under the ordinary use of the word.

Webster's Dictionary defines "unload" to be "to take the load or cargo from; to disburden."[47]

These employees are certainly removing the freight from the vehicle when they roll it out of the vehicle with their two-wheel trucks and the evidence shows too clearly that they perform duties which are an integral part of that process necessary to be performed in the loading or unloading of trucks.

However, they also come within the Commission's definition of a "loader" for another reason. The Commission states that those who transfer freight "between motor vehicles" and "between vehicles and the warehouse" are "loaders." It is too clear for argument when a wheeler rolls his two-wheel truck loaded with freight from one truck to another, in transferring loads of freight from truck to truck, he is certainly transferring freight "between motor vehicles." It is also too clear to admit of argument that when he rolls his two-wheeler into or out of a truck, to or from the warehouse dock, he is transferring freight "between a vehicle and a warehouse."

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[47] Webster's Collegiate Dictionary, Fifth Edition.

No question is raised on this record that these employees perform any other duties. When the wheeler is helping push or carry a heavy piece of freight from one truck to another, or from the truck to the warehouse, or from the warehouse to the truck, it cannot be said that he is not "transferring freight between motor vehicles" and "between the vehicles and the warehouse."

The Commission very clearly and concisely described the duties of this class of employee, and it so clearly describes them in its definition, that there is no room left for argument on the proposition that they do not come within this definition. *They do just exactly what the Commission's definition says, that is all they do, and therefore they should be held to come within the definition and therefore under the exemption.*

As to the "breakout-man," the record shows that he is the first man who touches the freight when it is being loaded into a truck, *i. e.*, he picks it up out of the stack of freight on the dock and places it on the two-wheeler. The record further shows that he, along with the rest of the crew, helps move heavy shipments either on rollers or by hand into or out of trucks.

When a truck is being unloaded, he stands in the truck that is being unloaded and removes the freight from the stack in the truck and places it on the two-wheeler to be transported out of the truck by the wheeler.

These duties likewise are an integral part of the process of loading and unloading of a truck. In addition, the breakout man operates a two-wheeler on occasions when the crew is short, or when it is not necessary to have a breakout man in the truck.

The Commission said "load" and "unload" trucks. It can clearly be seen that the breakout man is the first link in the chain of the freight's journey in or out of the truck. His duties are just as essential to the loading and unloading

of trucks as those of any of the other members of the crew, and it was clearly within the Commission's intentions to include him in the category of those who load and unload trucks. If they had intended to exclude him, or any of the class of employees in question here from their definition, they would have said so, as they excluded "dispatchers" and other employees who performed no physical integral part of the process of "loading" or "unloading."[48]

The Commission's definition of a "loader" fits the activities of these employees like a glove. It can clearly be seen from the record that they all load and unload motor vehicles. It is further clear from this record that all of these employees transfer freight between vehicles, and between the vehicles and the warehouse.

Furthermore, the record shows that these employees spend a substantial part of their time performing the same duties as a "stacker."[49]

They work along with the whole crew in moving heavy shipments or long and heavy pipe in and out of trucks and placing these shipments in the truck where they ride over the road, or help the stacker place heavy shipments he is unable to handle, which occurs several times a day, several times probably with each truck.[50]

Under the principles announced in the *Levinson* case, as those principles have been summarized in the dissenting opinion, footnote number 8, if these employees spend any time at "loading" or "unloading," they are within the Commission's jurisdiction.

Therefore certainly since these two classes of employees spend a substantial part of their time each day in actually

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[48] 28 M. C. C. 134, clerks who handle accident reports, etc.; 28 M. C. C. 130, clerks who prepare truck schedules; 28 M. C. C. 133, garage workers who only oil, gas or grease trucks.

[49] His regular job is to stack freight in the truck.

[50] Tr. p. 57.

placing shipments in the truck, they are clearly under the Commission's jurisdiction.

We respectfully submit that the Court should hold that the Interstate Commerce Commission, after a full, extended, public and fair hearing, has determined that the activities of "loaders" affect the safety of operations of motor vehicles. That those employees whose sole duties are to load and unload trucks, and transfer freight "between vehicles and the warehouse," and "between vehicles" are "loaders." That the employees involved here, namely, "breakout-men" and "wheelers," whose sole duties are to load and unload trucks, and transfer freight "between trucks and the warehouse," and "between trucks," are "loaders." That therefore these particular employees are subject to the jurisdiction of the Interstate Commerce Commission under Section 204, and that therefore their wages are exempt from the overtime provision (Section 7) of the Fair Labor Standards Act under the exemption contained in its Section 13(b)(1).

The Hostler Is a "Driver"

In our statement of facts we have analyzed the duties of a "hostler," and will not repeat an explanation of his duties here.

Our task here will be to show why he should be classed as a "driver" as defined by the Commission in language as follows:

> "As used in these regulations:
>
> "(a) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commismission, but does not include any vehicle, locomotive or car operated exclusively on a rail or rails.

"(b) The term 'driver' means any individual who drives in transportation in interstate or foreign commerce any motor vehicle as defined in paragraph (a) above."

Paraphrasing this definition, a driver is an individual, who drives any vehicle used on the highways in the transportation of passengers or property in interstate commerce.

The term "hostler" is sometimes used in the motor carrier industry to denote that particular class of employees who drive such trucks about the terminal.

We say it makes no difference what you call the employee. We say a "hostler" is simply a driver. It is our contention that the duties performed by this type of employee are the governing factor, and that they are those of a driver as defined by the Interstate Commerce Commission in the above-mentioned proceeding, and they, therefore being under the Commission's jurisdiction, are exempt from the effect of the Wage and Hour Act.

The place of work of these employees is at, and about the terminal, of the Petitioner in the City of Memphis.

This "terminal" consists of a large lot on which is located an office building which is connected to the warehouse. The warehouse has loading docks on both sides. Behind the warehouse and office building is located a large garage, and surrounding these structures is land which is used as the parking area for Petitioner's trucks. On the east side of the terminal building is a large lot which is primarily used for parking trucks and for access to the loading dock. On the west side of the terminal building is a small lot running the length of the docks, where trucks are parked while being loaded and unloaded.

On the west side of the terminal property is located a public alley, and immediately adjacent to the west side of

the alley is located what is commonly known as the "Stock Yards."

The alley runs north and south into McLemore Avenue, which runs in front of the terminal property the entire length.

Along the east side of the terminal property is a public street known as Kansas Street which intersects McLemore Avenue at the northeast corner of the terminal property. Also located on the east side of the terminal property are railroad tracks of the Frisco Railroad which must be crossed when trucks are driven to and from Petitioner's parking lot.

A reference to Exhibits 1, 2 and 3 to witness Davis' testimony will show the location of the streets and alley mentioned above.

The record shows that there is no way to move a truck from the west side of the dock to the garage, or to the east side of the dock, without entering the alley, McLemore Avenue or Kansas Street, crossing the railroad tracks (Tr. 40, 41).

We have heretofore stated that the "hostler" handles trucks to and from the dock, the parking lot and the garage, and in doing so, he proceeds over the streets mentioned.

The evidence shows that this employee drives the trucks of Petitioner, loaded with interstate freight, which have completed or are about to begin their over-the-road journey; that is, trucks used by Petitioner for transporting property over the highways in interstate commerce. (Tr. pp. 284, 285.)

We anticipate that the Administrator will contend that this employee is not a driver, because he does not actually drive trucks to or from the Petitioner's terminal over the streets or highways to or from destinations distant from Petitioner's terminal. However, our answer to that contention is that the origin and destination of a trip made

by a hostler with a truck is not material. The course taken by the hostler in moving the trucks is material. In spotting trucks about the terminal, this hostler does actually travel on two public streets, a public alley and crosses two railroad tracks, with their appurtenant right-of-ways. His duties are principally the duties of a driver, with the additional responsibility of making certain mechanical connections. In other words, the hostler drives trucks over public thoroughfares, just like a pickup driver or an over-the-road driver, except that his activities are confined to the area about the terminal. The fact that his activities are so confined should not make any difference, since he does actually depart from the terminal premises of the Petitioner.

Every truck, when handled by the hostler, is handled in the process of transporting property on the streets and highways. (Tr. p. 85.) We do not have a situation here where this employee simply drives trucks in moving merchandise between points within Petitioner's terminal area, without ever leaving the premises. He does actually drive on public streets and on alleys which are not located on defendant's premises.

The hostler is the employee who performs either the beginning or the end of the freight's interstate journey.

The question of the distance the trucks are driven is immaterial. His activities are a part of the process of the over-the-road operation, and they are essentially that of a "driver".

His activities of driving loaded tractors and trailers, and those that are to be loaded, are as much a part of the transportation of the freight as is the driving of these trucks by the over-the-road drivers. The only distinction between the two classes of drivers is that the hostler does not drive the trucks as far as do the road drivers.

His duties are similar to those of the engineer on a switch engine who, with his engine, has been held to be

engaged in commerce in running the engine about the rail yard.

This was so held in the case of *Director General of Railroads* v. *Bennett*, 268 F. 767, Certiorari, denied, 254 U. S. 656.

The Court stated part of the facts as follows:

> "Bennett, engineer of a yard engine, employed in shifting service of a railroad engaged in both interstate and intrastate commerce hauled a train of interstate cars to its destination in the railroad yard. This terminated all service in connection with the train. The eight hour day of the shifting crew having ended, or being about to end, the next movement of Bennett and his engine was toward the roundhouse there to receive orders, if any to be carried out on overtime; or lacking orders to discharge the crew and house the engine."

In making this movement he was killed. The judgment was challenged on one ground that both employer and employee were not engaged in interstate commerce when the accident occurred.

The Court held:

> "Similarly, on leaving his day's work, his last train movement having been of an interstate train, his movement homeward bound would be regarded as a necessary incident to the commerce he had just completed. Erie R. R. Co. *v.* Winfield. On both reason and authority we are of the opinion that when Bennett was injured while leaving his job at the end of the day notwithstanding the movement might have been but actually was not interrupted by an order to proceed elsewhere on overtime, he was but discharging a duty of his employment in a manner necessarily incident to the interstate movement he had just completed."

If the Court should hold that the activities of the "hostler" while driving trucks within the confines of Petitioner's terminal do not constitute him a "driver" we still have for consideration the time spent by him while driving on the public streets of Memphis. The hostler, the Administrator's witness, testified that he moves from fifteen to eighteen trucks per night,[51] and drives a trailer to the Air Base every day,[52] all of which are driven on the streets of Memphis.

The Administrator concedes that driving on the streets constitutes one a "driver",[52] but contends that time spent is the determining factor.

This Court has held otherwise in the *Levinson* case. An employee who drives trucks on the streets as much as the "hostler" does in this case certainly spends a substantial part of his time as a driver and is under the jurisdiction of the Commission, and exempt.

The Court should therefore held that he is a "driver", and that he is exempt from the overtime provisions of Section 7, of the Fair Labor Standards Act.

Conclusion

The United States Circuit Court of Appeals for the Sixth Circuit and the District Court were in error in concluding that the "breakout-men", "wheelers" and "hostlers" do not constitute them 'loaders" and "drivers" as defined by the Commission, and therefore not subject to its jurisdiction. The final judgment of the United States Cir-

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[51] Tr. p. 286.

[52] Tr. pp. 79, 80, 81.

cuit Court of Appeals for the Sixth Circuit entered April 14, 1947, should therefore be brought here for review and reversed.

Respectfully submitted,

GORDONS TRANSPORTS, INC.,
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Dated: Memphis, Tennessee, July 12, 1947.

APPENDIX A

No. 10139

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

Entered April 14, 1947

GORDON'S TRANSPORTS, INC., *Appellant*,

v.

L. METCALFE WALLING, Administrator, Wage and Hour Division, U. S. Dept. of Labor, *Appellee*

Before Hicks, Allen and Martin, Circuit Judges

ORDER

This case came on to be heard upon the record and briefs and oral argument of counsel.

And it appearing that the appellant is a motor carrier, operating in interstate commerce under a certificate of convenience and necessity issued by the Interstate Commerce Commission, and that it maintains a freight terminal and warehouse in Memphis, Tennessee, in which it employs certain workmen designated as 'breakout-men," "wheelers," and "hostlers";

And it appearing that the District Court in extended findings of fact determined that "breakout-men," "wheelers" and "hostlers" do not fall within the terms of clause 13(b)(1) of the Fair Labor Standards Act, which exempts from Sec. 7 of the Act "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Sec. 204 of the Motor Carrier Act of 1935;

And it appearing that the determination of the District Court is in accordance with the rule laid down in *Pyramid*

Motor Freight Corp. v. *Ispass, et al.*, —— U. S. —— (announced March 31, 1947), and that the findings of the District Court are clearly supported by the record;

It is ordered that the judgment be, and it hereby is affirmed.

Approved for entry:

(S.) FLORENCE E. ALLEN,
Circuit Judge.

(1573)